

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

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BEEF PRODUCTS, INC., BPI  
TECHNOLOGY, INC. and FREEZING  
MACHINES, INC.,

Plaintiffs,

vs.

AMERICAN BROADCASTING  
COMPANIES, INC., ABC NEWS, INC.,  
DIANE SAWYER, JIM AVILA,  
DAVID KERLEY, GERALD  
ZIRNSTEIN, CARL CUSTER, and KIT  
FOSHEE,

Defendants.

CIV. 12 -4183

**MOTION TO DISMISS BY DEFENDANTS  
ZIRNSTEIN AND CUSTER**

The above-named Defendants Gerald Zirnstein and Carl Custer, by and through their undersigned counsel of record, hereby move the Court pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(6) for an order dismissing Plaintiffs' Complaint as against them. In support of said Motion, Zirnstein and Custer have contemporaneously filed a supporting Brief, which is fully incorporated herein, and the Affidavits of Carl Custer, Gerald Zirnstein and Vince M. Roche. Zirnstein and Custer also adopt and incorporate the arguments advanced by the above-named ABC Defendants in support of their own Motions to Dismiss.

WHEREFORE, Gerald Zirnstein and Carl Custer respectfully request that the Court issue an order dismissing Plaintiffs' Complaint with prejudice and granting Zirnstein and Custer such other and further relief as is just and equitable.

Dated at Sioux Falls, South Dakota, this 31st day of October, 2012.

DAVENPORT, EVANS, HURWITZ &  
SMITH, L.L.P.

/s/ Vince M. Roche

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*Attorneys for Defendants Gerald Zirnstein and  
Carl Custer*

**CERTIFICATE OF SERVICE**

The undersigned, one of the attorneys for Defendants Gerald Zirnstein and Carl Custer, hereby certifies that a true and correct copy of the foregoing “*Motion to Dismiss*” was served upon the following counsel by filing the same with the Court’s CM/ECF system:

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/s/ Vince M. Roche

Vince M. Roche